824.

SUPREME COURT OF THE UNITED STATES.

No. 61.

BENJAMIN STORY, *Appellant*,

vs.

LOUISA LIVINGSTON, *Executrix of*

EDWARD LIVINGSTON.

APPEAL FROM THE CIRCUIT COURT U. S. FOR E. LOUISIANA.

INDEX.

	Original.	*Print.*
Copy of decree of Supreme Court U. S.	Page 1	3
Case transferred to Master in Equity, &c.	4	4
Oath of Master—Entries in Chancery Docket	5	5
Mandate from Supreme Court U. S.	7	6
Rule on Complainant to shew cause, &c.	11	8
Service of Rule	11	8
Grounds for Rule, &c.	12	8
Rule continued—motion to rescind order, &c.	13	9
Rule argued	16	11
Motion to dismiss overruled	17	11
Master's Report	18	12
Account referred to in Master's Report, marked A.	35	20
Exceptions to Master's Report	40	23
Exceptions to Report argued	41	24
Amended Report of Master	42	24
Decree	43	25
Petition for rehearing	44	25
Answer to petition for rehearing	47	26
Petition for rehearing, &c. argued	53	30
Petition refused—Order of Court	54	30
Petition of appeal to Supreme Court	55	31
Appeal allowed	56	31
Appeal Bond	57	32
Clerk's Certificate	62	34
Judge's Certificate	63	34
Writ of Error	64	34
Citation	65	35
Marshal's Return	66	35

UNITED STATES CIRCUIT COURT,

Eastern District of Louisiana.

EXECUTRIX OF LIVINGSTON
vs.
BENJAMIN STORY.

Be it remembered, That on the second day of March, Anno Domini one thousand eight hundred and thirty-seven, the following mandate from the Supreme Court of the United States was produced in open court by Randall Hunt, Esq., complainant's counsel, and was filed and recorded.

LOUISE LIVINGSTON,
EXT'X OF EDWARD LIVINGSTON,
vs.
APPELLANT BENJAMIN STORY.
No. 59.

On appeal from the District Court of the United States for the Eastern District of Louisiana.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it is ordered, adjudged, and decreed, that the decree of the said district, dismissing the bill of the complainant, be, and the same is hereby reversed and annulled. The court being of opinion that the transaction of the 25th July, 1822, between John A. Fort, Benjamin Story, and Edward Livingston, was a loan to the said Edward Livingston, secured by a pledge denominated an antechrisis in the law of Louisiana. And it is hereby further ordered, adjudged, and decreed, that the cause be sent back for further proceedings in the court below, with directions that the cause be referred to a master to take an account between the parties. And it is hereby further ordered, adjudged, and decreed, that in taking said account, there be allowed to the defendant all advances which shall be shewn to have been made by him, or paid on account of loan made to Edward Livingston, on the 25th day of July, in the year 1822, with the interest which the said Edward Livingston agreed to pay of eighteen per cent. per annum, to be calculated upon cash advances, from the time it was made until the 5th of August, 1823, and after that time at legal interest; and further, that in taking said account there be allowed to the defendant all reasonable expenditures made by the defendant, and John A. Fort, in building, repairing, and safe keeping of the property pledged by the said Edward Livingston, to secure the loan made to him on the 25th day of July, 1822, and that the complainant be credited in such account with all such sums as the defendant or John A. Fort, or either of them, have received from the said property; and that in taking such account, the rents and profits be applied first to the payment of the sums necessarily incurred in building and repairing; secondly, to the payment of the interest on the sums which

shall appear to have been advanced on the said loan, or in the improvement of the lot; and, thirdly, to the discharge of the principal of the said loan. And if on taking said account, it shall appear that there is a balance due of the complainant, it is hereby further ordered, adjudged and decreed, that the defendant pay to the complainant such balance within six months from the time of entering the final decree in the cause, and shall surrender and reconvey the said property to the complainant, or such person or persons as shall be shewn to be entitled to the same; and if upon the taking of said account it shall be found that any balance is due from the estate of the said Edward Livingston, deceased, to the defendants, it is hereby further ordered, adjudged and decreed, that on paying, or tendering to the defendant the said balance, he shall deliver up the possession, and reconvey to the person or persons who shall appear to be entitled to the same, the property so pledged to secure the aforesaid loan. And it is further ordered, adjudged and decreed, that in case a balance shall be found due to the defandant, and shall not be paid within six months after a final decree of the District Court upon the master's report, then the property shall be sold by order of the District Court at such time and notice as the said court shall direct; and that the proceeds be first applied to the payment of the balance due the defendant, and the residue thereof be paid to the complainant.

[*True Copy.*]

Test. (*signed.*) WM. THOMAS CARROLL,
Clerk Supreme Court, U. S.

And on the same day the following entry of record was made, to wit:

E. Livingston, Ext'x of,
vs.
B. Story. } No. 3380.

On motion of R. Hunt and H. Carlton, Esquires, of counsel for the complainant, the mandate of the Supreme Court in this case, was put on file, and ordered to be recorded.

And afterwards on the 3d March, the following entry of record was made, to wit:

Louise Livingston,
Ext'x of Ed. Livingston,
vs.
Benj. Story. } 3380.

On motion of Randall Hunt, complainant's solicitor, it is ordered that this case be referred to Duncan N. Hennen, Master in Equity, to examine into and report upon the account ordered to be taken in this case, according to the rules and principles established in the

judgment of the Supreme Court of the United States, filed, in this case, on 2d March, 1837.

And on the same day the following Master's oath was filed, to wit

Friday, March 3, 1837.

I, Duncan N. Hennen, being appointed in the case of Edward Livingston's executrix, Louise Livingston *vs.* Benjamin Story, as Master in Chancery, to examine, audit, report, and settle the accounts between the parties, according to the directions in the mandate of the Supreme Court of the United States, filed 2d March, 1837, do solemnly swear that I will well and faithfully perform the duties of the said office according to law, and the best of my abilities and understanding.

[SIGNED.] DUNCAN N. HENNEN.

Sworn to in open court before me this 3d March, 1837.

[SIGNED.] SAM. H. HARPER, *Judge U. S.*

And afterwards the following entries were made in the chancery docket, to wit:

EDW. LIVINGSTON *vs.* BENJ. STORY. } 3380.

March 3d. Reference to the Master in Chancery.

Ordered, that a meeting be held at my office on Monday, 6th inst., at half-past four o'clock, P. M.

[SIGNED.] D. N. HENNEN,
Master in Chancery.

EDW. LIVINGSTON'S Executrix *vs.* BENJAMIN STORY. } 3380.

March 6th. Reference to a Master in Chancery. Continued to 8th instant, at eleven o'clock, A. M.

[SIGNED.] D. N. HENNEN, *Master.*

EDW. LIVINGSTON'S Executrix *vs.* BENJAMIN STORY. } Reference to Master in Chancery.

Reference this day commenced, and testimony taken on behalf of the complainants: when on motion of R. Hunt, complainant's solicitor, adjourned to to-morrow at twelve M.

[SIGNED.] DUNCAN N. HENNEN,
Master in Chancery.

March 8, 1837.

Wednesday, March 9th, 1837.

EDW. LIVINGSTON'S Executrix
vs.
BENJAMIN STORY.

Reference was this day continued, on motion of Randall Hunt, Esq. complainant's solicitor, to 24th March, 1837.

March 24th, 1837.

EDW. LIVINGSTON'S Executrix
vs.
BENJAMIN STORY.

Reference continued. Giraud examined, and adjourned to 1st April, 1837, Meridiem.

SAME,
vs.
SAME. April 1, 1837.

Continued on application of Story to the 15th April, 1837.

April 16th, 1837.

LIVINGSTON'S Executrix
vs.
BENJAMIN STORY.

Reference held this day, and finally closed as per report on file in the cause.

And afterwards, on the 19th April, 1837, the following mandate was filed, to wit:

UNITED STATES OF AMERICA, ss.

The President of the United States of America,

(SEAL.) To the Honourable the Judge of the District Court of the United States, for the Eastern District of Louisiana. Greeting:

Whereas, lately in the District Court of the United States, for the Eastern District of Louisiana before you, in a cause between Louisa Livingston, executrix of Edward Livingston, deceased, complainant, and Benjamin Story, defendant, the decree of the said District Court was in the following words, viz.—"It is ordered, adjudged, and decreed that the bill be dismissed 'at the cost of the complainant.'"

As by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States, by virtue of an appeal, agreeably to the Act of Congress in

such case made and provided, fully and at large appears. And whereas, in the present term of January, in the year of our Lord one thousand eight hundred and thirty-seven, the said cause came on to be heard before the said Supreme Court, on the said transcript of the record, and was argued by counsel, on consideration whereof, it is ordered, adjudged and decreed, that the decree of the said District Court, dismissing the bill of the complainant, be and the same is hereby reversed and annulled—the court being of opinion that the transaction of the 25th July, 1822, between John A. Fort, Benjamin Story, and Edward Livingston, was a loan to the said Edward Livingston, secured by a pledge denominated an antechrisis in the laws of Louisiana. And it is hereby further ordered, adjudged and decreed, that the cause be sent back for further proceedings in the court below, with directions that the cause be referred to a master to take an account between the parties. And it is hereby further ordered, adjudged and decreed, that in taking said account there be allowed to the defendant, all advances which shall be shewn to have been made by him, or paid on account of the loan made to Edward Livingston on the 25th day of July, in the year 1822, with the interest which the said Edward Livingston agreed to pay of eighteen per cent. per annum, to be calculated upon cash advances from the time it was made until the 5th August, 1823, and after that time at legal interest. And further, that in taking said account the defendant be allowed all reasonable expenditures made by the defendant and John A. Fort, in building, repairing, and safe keeping of the property, pledged by the said Edward Livingston to secure the loan made to him on the 25th day of July, 1822, and that the complainant be credited in such account with all such sums as the defendant, or John A. Fort, or either of them have received from the said property. And that in taking such account, the rents and profits be applied, first, to the payment of the sums necessarily incurred in building and repairing. Secondly, to the payment of the interest on the sums which shall appear to have been advanced on the said loan, or in the improvement of the lot. And thirdly, to the discharge of the principal of the said loan. And if on taking said account, it shall appear, that there is a balance due to the complainant, it is hereby further ordered, adjudged and decreed, that the defendant pay to the complainant such balance within six months from the time of entering the final decree in the cause, and shall surrender and reconvey the said property to the complainant, or such person or persons as shall be shewn to be entitled to the same—and if upon the taking of said account it shall be found that any balance is due from the estate of the said Edward Livingston, deceased, to the defendant, it is hereby further ordered, adjudged and decreed, that on paying, or tendering to the defendant the said balance, he shall deliver up the possession and reconvey to the person or persons who shall appear to be entitled to the same, the property so pledged to secure the aforesaid loan. And it is further ordered, adjudged, and decreed, that in case a balance shall be found due to the defendant, and shall not be paid within six months after a final decree of the District Court upon the master's report,

then the property shall be sold by order of the District Court at such time and notice as the said court shall direct, and that the proceeds be first applied to the payment of the balance due the defendant, and the residue thereof be paid to the complainant. February 16.

You therefore, are hereby commanded that such further proceedings be had in said cause, in conformity to the opinion and decree of this court, as according to right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness, the Honourable Roger B. Taney, Chief Justice of said Supreme Court, the second Monday of January, in the year of our Lord one thousand eight hundred and thirty-seven.

[SIGNED.] WM. THOS. CARROLL,
Clerk of the Supreme Court of the United States.

And afterward, on the 20th November, 1837, the following rule was entered, to wit:

EXT'X OF ED. LIVINGSTON
vs.
BENJAMIN STORY. } No. 128.

On motion of R. H. Chinn, Esq., on behalf of the defendant in this case, Ordered that the complainant show cause on Friday, 1st December, 1837, why the complainant's suit should not be stricken from the docket, the bill of the complainant dismissed, or the suit abated, on the grounds on file.

And on the same day copies of the said rule were issued from the Clerk's office, on one of which the following Marshal's return was made and filed; to wit:

MARSHAL'S RETURN.

Served a copy of the within rule on Messrs. Carleton & Lockett, by leaving the same at Mr. Lockett's office, with a free white person above 14 years of age.

Returned, Nov'r. 20 1837,

(SIGNED) WILLIAM SHEARER,
U. S. D'y. Marshal.

And on the same day the following grounds for rule was filed, to wit:

EXT'X OF ED. LIVINGSTON
vs.
BENJAMIN STORY. } 3380.

In 9th Circuit Court of the United States, for the Eastern District of Louisiana.

The defendant moves the court for a rule upon the complainant,

returnable on the 1st day of December next, to show cause why the complainant's suit should not be stricken from the docket, the bill of the complainant dismissed, or the suit abated, because,

1st. Edward Livingston, the former complainant herein, departed this life on the day of and before the hearing of this cause in this court at the spring term thereof, in 1836.

2d. The said Livingston departed this life before the making or enrolment of the decree herein at the spring term of the year 1836—consequently the court could not then entertain any jurisdiction of the cause.

3d. This cause has never been regularly revived in the name of the present complainant—nor could it be so revived by the laws and usages of Chancery practice, the claiming as a devisee.

(SIGNED) GRYMES & CHINN, *for Def't.*

And afterwards, on the 1st December, the following entries of record were made, to wit:

EXT'X OF LIVINGSTON *vs.* BENJAMIN STORY. } No. 128.

The rule heretofore taken in this case on the complainant to shew cause why this suit should not be stricken from the docket, bill dismissed, or the suit abated, came up to-day for hearing before the Court, John R. Grymes and R. H. Chinn, Esquires, appearing for defendant, and Randall Hunt, Esq. appearing for complainant, when on motion of John R. Grymes, Esq., the rule was continued until Thursday, the 14th inst. at 10 o'clock, A. M.

EXT'X OF LIVINGSTON *vs.* BENJAMIN STORY. } No. 128. In Equity.

On motion of Randall Hunt, Esqr., complainant's solicitor, it is ordered that the defendant show cause to-morrow morning, Saturday, 2d December, 1837, at 10 o'clock, A. M., why the order to continue the trial of the motion of the defendant for the abatement of this suit until Thursday week, should not be set aside, and an earlier day (for) fixed for the disposal of said motion.

And on the same day copies of the said rule were issued from the Clerk's office, on one of which the following marshal's return was made and filed, to wit:

MARSHAL'S RETURN.

Served, 1st December, 1837, on R. H. Chinn, Esq., personally, at New Orleans.

[SIGNED] J. H. HOLLAND, *Marshal.*

And afterwards, on the 2d day of December, 1837, the following order of court was made, to wit:

EXT'X OF LIVINGSTON
vs.
BENJAMIN STORY. } No. 128.

The rule taken yesterday in this case on the defendant, to shew cause why the motion to abate the suit should not be set for hearing at an earlier day, came up to-day before the court, Randall Hunt, Esq. appearing for complainant, and R. H. Chinn, Esq., for defendant, when, after hearing the arguments of counsel, it was ordered by the court that the said motion to abate the suit be fixed for hearing for Tuesday next, 5th December, 1837, at 10 o'clock, A. M.

And afterwards, on the 11th December, the following order of court was made, to wit:

EXT'X OF EDW'D. LIVINGSTON
vs.
BENJAMIN STORY. } No. 128.

On motion of R. Hunt, Esq., ordered that the rule heretofore taken by defendant on complainant, to shew cause why this suit should not be abated, be set for trial for Thursday next, 14th inst., at 10 o'clock, A. M., then to take precedence of the other business set for that day.

And on the same day, the following notice was issued from the Clerk's office, to wit:

United States Circuit Court,

Eastern district of Louisiana.

EXT'X OF ED. LIVINGSTON
vs.
BENJ. STORY.

To the defendant in this case:—

You are hereby notified that the rule heretofore taken in this case, is set for trial for Thursday, the 14th day of December, 1837, at 10 o'clock, A. M. By order of the Court.

[SEAL.] Witness my hand, and the seal of the Court, this 11th day of December, 1837.

[SIGNED] T. W. COLLINS, *D'y. Clerk.*

MARSHAL'S RETURN.

Served copy of the within document personally on R. H. Chinn,

Esq., solicitor for Benjamin Story, defendant at the city of New Orleans, 11th Dec'r. 1837.

[SIGNED] J. H. HOLLAND, *Marshal.*

And afterwards, on the 14th December, 1837, the following entry of record was made, to wit:

EXT'X OF LIVINGSTON
vs.
BENJ. STORY. } No. 128.

The rule heretofore taken in this case to shew cause why this suit should not be stricken from the docket, the bill of complaint dismissed, or the suit abated, came up to-day for trial before the court, R. H. Chinn and John R. Grymes, Esquires, appearing for the defendant, and Randall Hunt and M. W. Hoffman, Esquires, appearing for complainant, when after some progress, the cause was continued for further hearing until to-morrow at 1 o'clock, P. M.

And afterwards, on the 15th December, 1837, the following entry of record was made, to wit:

EXT'X OF ED. LIVINGSTON
vs.
BENJAMIN STORY. } No. 128.

On this day the rule continued from yesterday, came up again before the court, the parties by their counsel appearing as heretofore, whereupon the arguments of counsel were resumed and concluded, when the court took time to consider.

And afterwards, on the 18th December, the following three entries of record were made, to wit:

EXT'X OF LIVINGSTON
vs.
BENJ. STORY. } No. 128.

The Court having maturely considered the rule taken by the defendant on complainant, to shew cause why the complainant's suit should not be striken from the docket, the bill of complaint dismissed, or the suit abated, now order that the testimony offered by the defendant, to prove the facts alleged as the grounds of said rule be rejected, and the motion overruled.

EXT'X OF LIVINGSTON
vs.
BENJ. STORY. } No. 128.

On this day complainant's counsel, Randall Hunt, Esq., being pre-

sent in court, it was moved by R. H. Chinn, Esq., defendant's counsel, that he be permitted to give evidence in this case that Edward Livingston had left other heirs besides Mrs. Louisa Livingston, whereupon it was ordered that said motion be overruled.

EXT'X OF ED. LIVINGSTON *vs.* BENJ. STORY. } No. 128.

On this day Duncan N. Hennen, Esq., Master in Chancery, to whom this case had been referred in order to take an account between the parties according to the judgment of the Supreme Court, presented his report to the court, whereupon the same was read and filed.

And afterwards, on the same day, the following Master's report was filed, to wit:

Circuit Court of the U. S. 9th Judicial Circuit, East Dist. of Louisiana.

EXT'X OF E. LIVINGSTON *vs.* BENJAMIN LIVINGSTON. } *In Chancery.*

To the Hon. the Circuit Court of the U. S. 9th Circuit sitting for the East Dist. of Louisiana.

The report of Duncan N. Hennen, appointed to act as a Master in Chancery in the above case.

This case having been referred to me by this Hon. Court with directions to take an account between the parties according to the judgment rendered by the Supreme Court of the U. States, in January, 1837, I caused the parties to be summoned before me for that purpose, on the 8th of March last. Randall Hunt, Esq., attended on the part of the complainant; the defendant appeared in person, accompanied by T. Robinson, Esq., acting as his counsel. Mr. Hunt called on the defendant for his account of all moneys advanced, laid out, and expended by him and John A. Fort, on account of the loan made to Edward Livingston, on the 25th July, 1822, and the property pledged to secure it; and of the rents and profits received by the defendant and the said John A. Fort, from said property according to the decree in this cause.

The defendant excepted to going into the account at that time, 1st, Because his counsel, R. H. Chinn, Esq., was absent from the city, and 2d, Because he had been so much occupied as not to have had leisure to complete the account; and requested for these reasons, that the hearing should be postponed.

On the part of the complainant it was replied, that the reasons urged by the defendant furnished no sufficient grounds for postponing the account: that the defendant was then assisted by counsel, and

had not stated when Mr. Chinn would return: that the decree of the Supreme Court of the U. S. had settled the principles on which the account was to be based, and that defendant was conversant with matters of account; that defendant had already had ample time to prepare his account: that it appeared from the documents filed in the case that the defendant had presented to the court an account up to 1st February, 1829, and that it required very little labour to complete the whole: and that complainant was convinced that the object of the defendant was, not to prepare an account, but to delay and evade the decree.

Being of opinion that opening the account could operate no injury to either party, I overruled the defendant's exception, with the understanding that ample [time] should be afforded him to furnish his account or produce rebutting evidence.

Complainant's counsel then stated, that he had found it impossible to discover all the amounts received by the defendant and said Fort, on account of the property pledged by Mr. Livingston to them without the aid of defendant himself: that he was therefore obliged to offer in evidence the credit side of an account filed by defendant in the case of Desbordes *vs.* Story and sworn to by him on the 25th April, 1829, to shew the rents and profits received by defendant from said property, up to the 1st February, 1829.

Defendant objected to this, upon the ground that there were many errors in that account which he was prepared to shew, and which he claimed the right to rectify. In reply it was stated that the complainant was unwilling to throw any difficulty in the way of a full, fair and equitable adjustment, and that, although it might be well argued, that the defendant was estopped from disputing his own statement made under oath, complainant would readily concede to him the right to correct any error which he could prove in the account.

I was clearly of opinion that the defendant's admissions under oath were evidence against him. (2 Starkie's Ev. p. 30—Cresley's Equity Ev. p. 10.) I accordingly overruled the exception and received the evidence, subject to the right conceded to the defendant of proving any error.

The amounts of rents received for the pledged property were then given in evidence by the complainant's counsel, from the account sworn to by defendant in the case of Desbordes vs. Story, from 1st January, 1824, to 1st February, 1829: and Mr. Lovell and Mr. Casernas were sworn on the part of the complainant, and examined by the parties. The particulars of their testimony will be pointed out in the subsequent part of this report.

The meeting was then adjourned until the next day at 12 o'clock, meridian. On the next day, to wit, the 9th March, 1837, the parties again attended before me, but the witnesses who had been summoned did not appear at the appointed hour. After a few moments the defendant suggested to the complainant's counsel the propriety of adjourning for a few days, when he would be ready to present his account, which was almost ready. Complainant's counsel assenting, the meeting was adjourned until the 24th March, 1837.

On the 24th March the same parties appeared again before me. Mr. Giraud was examined on the part of the complainant. His testimony will be noticed in its proper place. The defendant declared he had been prevented by business of importance from completing his account, and requested a little more time to make it complete. With the consent of complainant's counsel this meeting was adjourned until the first day of April, 1837, at 12 meridian. Before separating it was agreed between the parties, that the certificates of those tenants who rented the property, the subject of this suit from the defendant, should be received as evidence of the amounts of rents respectively paid by them. On the 1st day of April, 1837, the parties appeared again before me, and Mr. Story again requesting time, the case was continued until the 15th April, 1837.

On the 15th of April, 1837, the complainant's counsel attended before me at the appointed hour. The defendant attended also, accompanied by his counsel, R. H. Chinn, Esq.

Defendant inquired if complainant had any further evidence to offer, to which her counsel replied that she had not, except the certificate referred to at the meeting of the 24th March last; at the same time adding, that he only waited for the defendant's account to close the reference finally. Defendant rejoined, that he did not intend to furnish any account; whereupon complainant's counsel called upon me to note this declaration.

Defendant's counsel then urged, that inasmuch as complainant had used the defendant's account in the case of Desbordes *vs.* Story, for the purpose of charging the defendant with the amounts received, the account must be considered evidence to shew the expenditures made by Fort & Story.

To this complainant's counsel excepted, upon the ground that although it was a general rule that where a paper is produced by one of the parties from which he takes his charge, the same paper may be read by the other party by way of discharge: yet that this rule is not applicable to cases of confidence and trust, and where the party is bound to furnish an account: but in this case the complainant was willing to admit the correctness of the account of the defendant as sworn to by him—with the exception of the item of one thousand dollars paid to Mr. Morse on the 12th of February, 1824, and of the calculations of interest, which must be corrected according to the decree.

In looking into the authorities to which I have had access, I find the positions assumed by the complainant's counsel fully sustained on this subject. (5th Rand. 319. Robertson *vs.* Archer, Cresley's Equity Evidence.) As to the right of the complainant to disprove any item of the account charged against the estate [of] Livingston, it cannot admit of a reasonable doubt.

Any decision on this point is unnecessary, as the account of defendant's expenditures, with the exception of Morse's fee of $1000, is admitted by the complainant.

With the respect to the item of Morse's fee, the defendant says that he "paid Nathan Morse, Esq., the attorney of Edward Living-

ston in this matter, the sum of $1000—which sum he stated he considered ought to have been paid him by said Livingston, for effecting a sale of the said property." Mr. Lavergne, the notary, swears that "Mr. N. Morse came up to his office, accompanied by Mr. Story, at the period named for the purpose of making the sale above referred to. Mr. Morse appeared in this transaction to be the legal adviser of Messrs. Fort & Story; at this time Mr. Livingston was, and had been for some time, a member of the New-Orleans bar, of great practice and celebrity, and it was not probable that Livingston would employ a lawyer to advise him." It is not likely that Story would pay so large a sum for Livingston merely on Morse's allegation that he considered the sum ought to be paid. The defendant filed with his answer two letters (marked M. 1 and M. 2) to prove that Morse was the agent of Livingston. "Upon this item of money paid to Morse, we remark," say the Supreme Court, "that the letters of Morse do not prove Morse to have been the agent of Livingston in negotiating the transaction between the parties; but rather that he was, if not altogether the agent of Fort & Story, the agent of both the parties, and that the defendant, without consulting Livingston, graduated the compensation of Morse by his own ideas of the service rendered by him, and chose to pay Morse one thousand dollars after he considered Livingston had forfeited his right to redeem the property. The answer and exhibit are contradictory on this point: but the latter being more detailed and certain, it forces the conclusion to which we have become as regards that item." (11 Peter's Reports, 384. Livingston *vs.* Story.

For these reasons I have rejected the item of $1000 paid Morse, as a charge against Livingston.

Lovell, who was sworn on the 8th March, 1837, testified that he had been a tenant of one of the stores from the 1st day of November, 1823, until the present time inclusive; that he rented another of them from the year 1826 until 1829 inclusive; that from that time until the present he has occupied two of the stores, numbered 4 and 5 New Levee, and 8 and 10 on Tchapitoulas street: that he paid for each of the stores one thousand dollars per annum, for the years 1830, 1831 and 1832: that he paid for each of them, per annum, twelve hundred dollars in 1833, 1834 and 1835, and fifteen hundred dollars per annum in 1836 for each store: and that he continues to occupy two at present at the rate last mentioned. Mr. Lovell further testified that all the stores had been occupied every year since they were erected, with the exception of one store which was shut up for a year, and another store which was closed, he believes, part of a year. This was four or five years after he took the store he now occupies. There are seven stores in the building of equal size. On being cross-examined, Mr. Lovell declared, that during the first years the cellars leaked considerably; there being frequently two feet of water in them: that the defendant attended personally to the stores, employed masons to cement the cellars, and had the roofs more or less repaired every year; that the fair estimate of the repairs and expenses of each store would be about one hundred dollars per annum; that since the

paving of the streets and the extension of the wharves, the cellars leaked far less: that formerly the defendant was obliged to have them pumped out, but that for the last three years the tenants had them pumped [at] at their own costs.

Peter Casernas, the tenant of the corner store, was next sworn. He testified that he had a sub-lease up to the 1st November, 1836, of that store, at the rate of sixteen hundred dollars a year, and that he since leased the store from Mr. Story, at the rate of two thousand dollars per annum, from the 1st November, 1836.

On being cross examined, he testified that he had seen workmen tarring the roofs of all the stores, but that he could not say exactly how many were employed; supposed there were five—and that he could form no idea of the value of the work they did.

Mr. Giraud, of the firm of Champonier & Giraud, being sworn, testified that he had occupied one of the stores, to wit, No. 6 New Levee, for several years, and had paid rent for the same to Mr. Story; that he had paid from the 1st November, 1833, to November, 1834, $1200 for the said store; from November, 1834, to November, 1835, $1200; from November, 1835, to November, 1836, fifteen hundred dollars, and that his lease from November, 1836, to November, 1837, was at the rate of fifteen hundred dollars per annum.

Mr. Mignon, of the firm of Orain & Mignon, stated that he paid the defendant for the store No. 7 New Levee, from the 1st November, 1833, to 1st November, 1835, twelve hundred dollars per annum; and from the 1st November, 1835, to 1st November, 1837, fifteen hundred dollars per annum.

Mr. Turner testified, that the firm of Turner & Woodruff paid the defendant for the rent of store of No. 2 New Levee, from the 1st November, 1829, to the 1st November, 1832, one thousand dollars per annum; and from 1st November, 1832, to the 1st November, 1835, twelve hundred dollars per annum; from the 1st November, 1834, to the 1st November, 1835, twelve hundred dollars for store No. 3, and that from the 1st November, 1835, to the 1st November, 1837, they rented the stores No. 2 and 3, from defendant, at the rates of fifteen hundred dollars per annum each, which they have regularly paid.

On the foregoing evidence I am called on to make out an account between the parties. And in making it, the court in their decree, have ordered, "that there be allowed to the defendant all advances which shall be shewn to have been made by him or paid on account of the loan made to Ed. Livingston on the 25th day of July in the [year] 1822, with the interest which the said Ed. Livingston agreed to pay of 18 per cent. per annum, to be calculated upon cash advances from the time it was made until the 5th August, 1823, and after that time at legal interest. And further, that in taking said account the defendant be allowed all reasonable expenditures made by defendant and John A. Fort, in building, repairing, and safe keeping of the property pledged by the said Edward Livingston to secure the loan made to him on the 25th July, 1822, and that the complainant be credited in such account with all such sums as the defendant, or John A. Fort, or

either of them, have received from the said property; and that in taking such account the rents and profits be applied first, to the payment of the same sums necessarily incurred in building and repairing. Secondly, to the payment of the interest on the sums which shall appear to have been advanced on the said loan, or in the improvement of the lot; and thirdly, to the discharge of the principal of the said sum." The annexed account, marked A, has been made in strict accordance with the principles laid down by the Supreme Court of the U. S.; from which decree it will appear that the rents and profits are to be first applied to the extinguishment of the expenditures in "building, repairing, and safe keeping" of the property pledged, next to the interest on those sums; then to the interest on the capital, and lastly to the extinguishment of the capital.

It will be observed, that no interest is granted by the decree to the complainant on the rents and profits, but only the right to have them imputed as payments in the manner above mentioned.

In the calculation it will be observed that the rents and profits extinguished the interest on the expenditures, and the expenditures themselves, on the 1st day of February, 1829, with the exception of a small balance of interest amounting to $85 47.

That in making the calculation interest is allowed on the rents and profits to the complainant up to the 1st February, 1829, but this it may be observed is only for the purpose of shortening tedious calculations by imputation of payments, the arithmetical result is the same in either mode of calculation, because the expenditures with interest exceed on that day, the rents and profits with interest; otherwise had the rents and profits exceeded at that time the expenditures, there would have been error produced by this mode of calculation, which error would have been equal to the interest on the excess of the rents, &c. over the expenditures.

The balance of $35 47 is a part of the interest on the expenditures remaining unextinguished on the 1st February, 1829, and therefore bears no interest.

By the next step in the calculation we ascertain, that on the 1st. day of April, 1832, the interest on the loan of the 25th July, 1822, was	$18201 66
Add the Balance	35 47
	18237 13
And that the rents and profits on that day, after deducting $700 each year for repairs, taxes, &c. were	23325 00
Leaving a balance of	5087 87
To be applied to the extinguishment of the capital or loan of July 25th, 1822.	22771 40

By imputation of payments of the rents, which are supposed to be received on the first April, of each year, the equated time from November to November, it appears from the account that the capital was extinguished, and that a balance is due on the first November, 1837, from the defendant Benjamin Story, to the com-

plainant, the Executrix of E. Livingston, of the sum of thirty-two thousand nine hundred and fifty eight dollars and eighteen cents.

In calculating by imputation of payments I have followed the rule adopted by the Legislature of Connecticut, and laid down in Kirby's Reports, p. 49, which is by calculating interest on the capital to the time of payment, and from the sum of capital and interest, deducting the payment, and so on with other payments, which rule appears to be accurate in its results, and preferable to the common mode of calculation, of deducting the payments with interest from the capital and interest up to the time of final settlement; by which mode it is evident in a long series of years, the interest would absorb the capital.

The property pledged by Livingston, consists of seven stores of equal size and extent, with cellars, &c.; they rented at equal rates, each tenant paying for the store he occupied the same rent, with the exception of the corner store, which rented higher than any other.

The rent of the corner store from 1st November, 1836, was two thousand dollars per annum, while the rent of each of the others was only fifteen hundred dollars per annum; the rent paid by Casernas for the corner store was at the rate of $1600 per annum, while each of the other stores rented for only twelve hundred dollars per annum; from these facts and from my own knowledge of rents, I think it fair to allow for the corner store twelve hundred dollars rent per annum; during the time the other stores rented for one thousand dollars each, per annum, and fifteen hundred dollars per annum, while the others rented at twelve hundred each.

Accordingly in the annexed account I have put down the rent of the corner store $1000 per annum, from 1st of February, 1829, to the 1st of November, 1829, and the others for the same period at the rate of $800 each, per annum; from the 1st of November, 1829, to the 1st of November, 1832, the corner at $1200 per annum, and the others at $1000 each; from November, 1832, to November, 1835, the corner at $1500 per annum, and the others at $1200 per annum; from November, 1835, to November, 1836, the corner at ($1600) sixteen hundred dollars, and the others at $1500 each; from November, 1836, to November, 1837, the corner at 200, [$2000] and the others at $1500 each.

It appears from the copy of the will of Edward Livingston, and the proceedings had therein in the Court of Probates for the Parish of Orleans, in Louisiana, that Louisse Livingston, the widow and sole executrix of the said Edward Livingston, is made the heir of all his disposable property, and that the said Edward Livingston died leaving only one child alive, viz., Cora Livingston, his daughter, the wife of Barton, of Pennsylvania. As there does not appear to have been any marriage settlement or separation of property between the said Edward Livingston and Louise his wife, the said Louise Livingston is entitled to five-sixths of the property left by said Edward Livingston, and Cora Livingston, daughter of said Edward, is entitled to the one-sixth remaining part by the laws of Louisiana.

I do therefore recommend that it be ordered, adjudged and decreed,

that the defendant Benjamin Story, pay to the complainant the amount of thirty-two thousand nine hundred and fifty-eight dollars eighteen cents on the filing of this report, and that he do forthwith surrender and reconvey the property pledged by the said Edward Livingston, to secure the loan made by the defendant and Fort, on the 25th of July, 1822, which property consists of all that lot or parcel of ground situated on the batture of the suburb, St. Mary, between Common and Gravier streets, measuring eighty-two feet fronting Common street, and one [one] hundred and forty-six feet or thereabouts fronting Tchapitoulas street, and one hundred and forty-six feet or thereabout, fronting New Levee street, as described in the act of the 25th July, 1822, before H. Lavergne, Notary Public, and filed by defendant, and marked A. to Louise Livingston, the widow and sole executrix of Edward Livingston, and to Cora Livingston his daughter, wife of the aforesaid. Barton the heirs of the said Edward Livingston.

All which is respectfully submitted,

(SIGNED.) DUNCAN N. HENNEN,
Master in Chancery.

ACCOUNT A.

Edward Livingston's Executrix, and Benjamin Story, &c. *Dr.*

1822, Aug.	10	Lavergne Notary fees			10	50		
1823, Feb.	26	Two deeds of protest E. L.			10	00		
March	22	John Rust securing building			20	00	5.10.9	5 87
April	11	" pumping cellars			100		5.9.20	29 06
"	14	" balance in full			235	50	5.9.17	68 19
Aug.	16	" pumping			150	00	5.5.15	40 93
"	18	Advertising			25	50		
"	27	17500 bricks and hauling			214	87	5.5.4	58 30
Sept.	17	Lavergne serving protest E. L.			5	00		
Oct	4	Hauling earth and two days' work			132	25	5.3.27	35 25
"	11	" " $10.50 op'g. gutter to cellar			50	50	5.3.20	13 39
"	31	James Lambert cleaning out cellars			200	00	5.3.0	52 50
Dec.	10	Murray Iron work $523 50, 4 casks lime $9			532	50	5.1.21	136 82
Oct.	17	Beckel and Hamlet completing, average, &c.			6984	00	5.3.14	1847 85
"	17	James Lambert do			4250	00	5.3.14	1124 48
Dec.	30	Whitewashing labour, earth, numbering			159	30	5.1.1	40 41
1824, Feb.	1	Flag and curb stones from Montgomery $579.02, discharging, dragage and freight 230.47			809	47	5.0.0	202 35
Jan.	31	Lambert, 6 wheels, 8 cellar frames, 32 circular saws			1379	16	5.0.0	344 77
March	31	Flag stone from Montgomery $130.22, freight and draggage $49			179	22	4.10.0	101 59
"	31	Hasimer for flagging			241	25		
April	10	Insurance 7 stores			126	00	4.9.21	30 27
May	27	Pilic taking level of banquette			6	86	4.8.4	1 58
Aug.	3	B. and Hamblet tarring roof, &c.			122	76	4.4.28	27 09
1825, Jan.	11	City tax			48	00	4.1.20	10 00
April	26	James Lambert			126	15	3.9.5	23 64
June	27	Paid by J. A. Fort			475	52	3 7.4	85 19
July	21	State and Parish tax			81	60	3.6.10	14 39
Oct.	27	B. and Hamblet			181	00	3.3.4	29 50
1826, April	14	" " making cellars water proof			4717	50	2.9.17	658 47
1827, March	5	Covering stores with tiles			2239	54	1.10.26	213 05
June	16	Insurance			88	50	1.7 15	7 18½
Sept.	12	Ott work on No. 7			51	90	1.4.19	3 20
Nov.	17	Paving			918	62	1.2.14	55 50
"	30	Ott work on No. 7			38	50	1.2.0	2 24
Dec.	10	Dragage on flaggs			5	94	1.1.21	34
"	21	Extending banquette			135	00	1.1.10	7 50
"	22	Ott sash doors			23	00	1.1.9	1 25
1828, Feb.	2	B. and Hamblet flagging			88	31	1.0.0	4 41
April	15	Sheriff's fees, suit *vs.* Hamblet			5	00	0.9.14	
"	17	Taxes			160	00	0.9.14	6 33
June	16	Insurance			87	50	0.7.15	2 73
Aug.	9	Lambert cutting floor and making and hoisting wheel			55	00	0.5.22	1 30
Nov.	6	Jolly cleaning his store, lock, &c.			13	50	0.2.25	17
"	22	Hamblet work to cellar and materials			236	37	0.2.9	2 29
1824, May	7	Ott marking steps, pumping, &c.			96	40	4.8.24	22 89
1828, Jan.	15	Lane & Co. hearth scantling, lock			22	44	1.0 16	1 16
1829, Jan.	31	Leverick 1 bl. Cement 4 50. dragage 25			4	75	0.0.0	0 0
1826, April	14	Painting, taxes, filling up No. 2, plank and weather boarding			923	98	2.9.17	128 95
July	10	J. A. F.'s account	Insurance, levelling gutters, &c		148	30	2 6.21	18 94
1829, Jan.	10		Building privy, wheel rope, &c.		641	72	2.0.21	65 95
May	17		Taxes, painting, hauling earth &c		202	10	1.8.14	17 26
					27748	78		5528 53
			Interest,		5528	53		
					33277	31		
			Deduct rents and interest		33241	84		
			Balance of interest on expenditures not extinguished by rents on the 1st of February, 1829		$35	47		

ACCOUNT A.

Cr. *Edward Livingston's Executrix and Benjamin Story, &c.*

1824, Jan.	9	Rents			400	00	5 0.22	101	11
"	10	"			100	00	5.0.21	25	27
Feb.	4	"			390	00	4.11.27	97	50
"	9	"			100	00	4.11.22	25	00
March	5	"			490	00	4.10.26	120	46
April	5	"			590	00	4.9.26	142	58
"	14	"			180	00	4.9.17	43	12
May	7	"			570	00	4.8.27	135	37
"	21	"			100	00	4.8.10	23	47
June	9	"			570	00	4.7.22	132	20
July	9	"			670	00	4.6.22	152	61
Aug.	16	"			225	00	4.5.16	50	15
1825, Feb.	4	"			2661	66	3 11.27	532	32
June	27	"			1816	32	3.7.4	326	42
"	29	"			500	32	3.7.2	89	73
July	15	"			183	33	3.6.16	32	47
Aug.	3	"			183	33	3.5 28	32	00
Sept.	5	"			266	66	3.4.26	45	54
Oct.	13	"			266	66	3.3.18	43	87
1826, April	14	"			2333	32	2.9.17	325	69
July	10	"			1750	00	2 6.21	223	61
1827, Jan.	10	"			3063	76	2.0.21	314	88
May	17	"			1610	00	1.8.14	137	52
June	30	"			60	00	1.7.0	4	75
July	2	"			200	00	1.6.29	15	83
"	4	"			800	00	1.6.27	63	33
Aug.	1	"			225	00	1.6.0	16	87
"	2	"			100	00	1.5.29	7	50
"	7	"			140	00	1.5.24	10	50
"	28	"			100	00	1.5.3	7	08
Sept.	3	"			100	00	1.4.28	7	08
Oct.	3	"			100	00	1.3.28	6	66
Nov.	6	"			626	00	1.2.25	39	26
"	9	"			84	00	1.2.22	5	25
Dec.	7	"			100	00	1.1.21	5	80
1828, Jan.	15	"			1033	32	1.0.16	53	81
Feb.	7	"			700	00	0.11.24	35	00
March	8	"			100	00	1.0.23	4	60
April	5	"			300	00	0.9.26	12	28
May	8	"			750	00	0.8.23	27	08
June	10	"			100	00	0.7.21	3	19
July	14	"			900	00	1.6.17	24	75
"	28	"			200	00	0.6.3	5	00
Aug.	30	"			300	00	0.5.0	6	30
Sept.	16	"			300	00	0.4.15	5	62
Oct.	30	"			350	00	0.3.0	4	37
Nov.	15	"			966	67	2.16.0	10	07
Dec.	15	"			100	00	1.16.0		62
1829, Jan.	26	"			950	00	0.5.0		66
		Rents due first February, 1829			1000	00			00
					29705	69		3536	15
		Interest at 5 per cent.			3536	15			
					$33241	84			
		Receipts of the year ending Nov. 29, corner at $1000; the other six at $800		$5800					
		Deduct for repairs, ex., &c.		700					
				5100					
		Deduct amount up to first February '29, credited above		1275					
					3825	00			

ACCOUNT A.

Cr. Edward Livingston's Executrix and Benjamin Story, &c.

Amount brought forward		3825	00
Receipts from Nov. '29 to Nov. '30 cor. at $1200, others at $1000	$7200		
Deduct for repairs	700		
		6500	00
Receipts from Nov. '30 to Nov. '31,	7200		
Deduct repairs	700		
		6500	00
Nov. '31 to Nov. '32	7200		
repairs	700		
		6500	00
		$23325	00

Here it is to [be] observed that the rents, being in all probability, received monthly, I have fixed upon the month of April as the equated time when the whole was due and paid. This becomes necessary, as no interest is allowed by the decree on the rents received; the only right the complainant Livingston has is to have it immediately applied to the extinguishment of the interest.

Then there was received on 1st April, 1832,		$23,325 00
And the interest on the loan was	$18,201 66	
Add unextinguished balance,	35 47	
	$18,237 13	
		18,237 13
Balance left April 1, '32, after extinguishing the expenditures, with interest, and the interest on the loan of $22,771 40-100,		$5,087 87

The calculation now becomes more simple, and it relates to the extinguishment of the capital, $22,771 40-100, bearing 5 per cent. interest, from 1st April, 1832, with the payments which are to be imputed on each 1st April, the equated time.

Then from the capital,	$22,771 40
Deduct above balance on April 1, '32,	5,087 87
Debt on the April 1, '32,	17,683 53
Interest at 5 per cent. to 1st April, '33,	884 17
Amount of principal, &c. April 1, '33,	18,567 70

Amount brought forward,		18,567 70
Deduct rents, less expenses. Corner at $1,500, others at $1,200	$ 8,000 00	
		10,567 70
Interest to April 1, '34,		528 88
		11,096 58
Deduct rents, less expenses,		8,000 00
Received on April 1, '34,		3,096 58
Balance due April 1, '34,		3,096 98
Interest to April 1, '35,		154 84
		3,241 82
Deduct rents, less expenses, received on that day, (April 1, '34,)		8,000 00
Leaves this amount due by Story to Livingston's Executrix,		4,758 18
Add rents received November, '35, less expenses,		8,000 00
Do. do. Nov. 1, '36,		9,900 00
Do. do. Nov. 1, '37,		10,300 00
		$32,958 18

Making the sum of thirty-two thousand nine hundred and fifty-eight dollars and eighteen cents, due on the first of November, 1837, by Benjamin Story to Edward Livingston's executrix.

Stated by me, (signed,) DUNCAN N. HENNEN,
Master in Chancery.

And afterwards, on the 2d January, the following exceptions were filed, to wit:

LIVINGSTON
vs.
STORY.

The defendant excepts to the report of the Master in Chancery herein.

1st. Because Chancery practice has been abolished by a rule of this court, and such proceeding is unknown to the practice of the court.

2d. The master has erred in not allowing to the defendant the thousand dollars, with interest, paid to Morse, or some part thereof.

3d. The master's report does not shew that it reports all the evidence taken before the master.

4th. The master, in making his estimates and calculations, has not pursued the mandate of the court.

5th. It appears, from the master's report, that the stores were rented from November to November, and he erred in assuming the 1st April as the period of payment of annual rent.

6th. A reasonable allowance should have been made to Story for the costs and risk of collecting the rents.

7th. The master erred in all his charges against the defendant, and failed to allow the defendant his proper credits.

(signed.) GRYMES & CHINN, *for Defendant.*

And afterwards, on the 10th January, the following entry of record was made, to wit:

EXT'X of ED. LIVINGSTON *vs* BENJ. STORY. } No. 128.

The exceptions heretofore taken in this case to the master's report, came up to-day for trial before the court, Randall Hunt, Esq., appearing for complainant, and Jno. Grymes, Esq., appearing for the defendant, when, after hearing the arguments of counsel, the court, on motion of Duncan N. Hennen, Esq., Master in Chancery, and on motion of Randall Hunt, Esq., complainant's solicitor, ordered on the third of said exceptions, that the master be permitted to amend his report so as to state that the report contained all the evidence given before the said master at the taking of the account between the parties, under the reference which was made for that purpose, in pursuance of the mandate of the Supreme Court, and thereupon with regard to the other exceptions the court took time to consider.

And afterwards, on the 11th January, 1838, the following amended master's report was filed, to wit:

To the Hon. the Circuit Court of the United States for the 9th Circuit, holding sessions in the Eastern District of Louisiana.

The undersigned Master in Chancery, to whom was referred the settlement of the accounts in the matter of Edward Livingston's executrix *vs.* Benjamin Story, begs leave to amend his report, filed therein in this court, on the 18th day of December, 1837, (in pursuance of the leave of the court had and obtained on the motion of complainant's solicitor) by stating that the evidence contained *or* referred to in the report filed on the 18th December, 1837, in the matter of Livingston's executrix *vs.* Benjamin Story, is all which was adduced by the parties at the respective hearings had before the undersigned in his capacity aforesaid: and that the undersigned has no further evidence or facts to report to the court than those contained in the said report of the 18th of December, 1837.

All which is respectfully submitted,

(Signed) DUNCAN N. HENNEN,
Master in Chancery.

And afterwards, on the 16th January, the following entry of record was made, to wit:

EXT'X. OF ED. LIVINGSTON
vs.
BENJAMIN STORY. } No. 128.

The master having by leave of the court amended his report in this case, and the court having duly considered the said report, the exceptions filed thereto by the defendant, and the arguments of counsel do now order, adjudge, and decree, that the said exceptions be overruled, and that the defendant, Benjamin Story, do pay to the complainant, within six months from this day, the sum of thirty-two thousand nine hundred and fifty-eight dollars and eighteen cents. It is further ordered, adjudged, and decreed, that the master's report be in all other respects conformed, and that the defendant conform to the decree of the Supreme Court in this case.

And afterwards, on the 22d January, the following petition for rehearing was filed, to wit:

To the honourable the Judges of the 9th Circuit Court of the United States for the eastern district of the state of Louisiana. The undersigned counsel for Benjamin Story, in the case of Louisa Livingston, respectfully petitions the court to reconsider the decree pronounced in the cause, and permit said cause to be heard.

They had expected an opportunity would have been afforded them to have filed exceptions to the master's report as amended; and they would have urged, with some hope of success, that the master, under the order of [the] court referring the matter to him, did not possess the power to take testimony, and that if he did possess such power, then it was irregularly exercised, because it should have been by depositions upon interrogatories.

They had with entire confidence relied, that some opportunity would have been afforded them to be heard in the cause before any decree would be pronounced by the court. As far as they understand the practice in this court, or any other, the cause ought to have been set down for trial, it ought to have been placed upon some docket, some means should have been furnished the parties of ascertaining when it would suit the convenience or pleasure of the court to enter upon its investigation. If the cause was heard it was in the absence of one of the parties, and without any opportunity being afforded him to participate. They suppose the court was impressed that every matter necessary to be investigated after the coming in of the master's report had been adjudicated by the Supreme Court of the United States; in this they are persuaded there was a manifest misconception. The decrees of the Supreme Court have settled nothing save the questions of jurisdiction. That the transaction was a security for money loaned, and deferring the nature of the account to be made up. The question as to whom the property was to be conveyed and surren-

dered, was left open to be decided by this court; and that very important question still remains undisposed of. The counsel of Story are at a loss to determine whether the decree pronounced at the present term be a final one, or only interlocutory, and it is therefore, in their opinion, too vague and indefinite to answer the ends of judicial proceedings. What has become of the question of costs? the decree is wholly silent upon that subject. To whom is Story to convey the property? the Supreme Court has said, to Louisa Livingston, or to whomsoever shall appear to be entitled. This court has said, do all things directed by the mandate of the Supreme Court. Now it has appeared to the master in chancery that Cora Barton is entitled to a part, and Louisa Livingston to a part, and it so appears to the counsel of Story: but whether it so appears to this court is not manifested by the decree, and Story should not be driven to act at his peril in a matter of so much uncertainty, of such high importance. Upon no principle can Cora Barton be entitled to a decree in her favour; she is no party to this suit, and she is not bound by any of the proceedings; as to her rights, they would be coram non judice. If Story should convey the whole estate to Louisa Livingston, it would afford him no indemnity whatever against the future prosecution of the claim of Cora Barton. If he were to convey to the two in such portions as he considers them entitled, the parties might not be content, and Story might be holden to have acted in contempt of the court in disobeying its mandate, if the court should be of opinion that Louisa Livingston was entitled to the whole, or that the two were entitled in different proportions.

If the cause had been set down for hearing according [to] universal chancery practice, then an opportunity would have been afforded Story to make proof of the extent and nature of the claim of Cora Barton; but which, by the course of the court has been denied him. Perhaps any final decree in the cause should also define the character of warranty to be contained in the conveyance to be made by Story.

All of which is respectfully submitted,

(Signed) CHINN, &c., *for Story.*

And afterwards on the 2d February, the following answer to the petition for rehearing, was filed, to wit:

To the Honorable the Ninth Circuit Court of the United States, sitting in the Eastern District of Louisiana.

The answer of Louise Livingston to the petition of Benjamin Story, for a rehearing in the case of Executrix E. Livingston *vs.* Benjamin Story.

The said Louise, by her counsel, shews that the said petition contains no just and sufficient legal or equitable grounds for a rehearing.

The petition commences by declaring that the counsel for B. Story "expected an opportunity would have been afforded them, to have

filed exceptions to the master's report as amended. And they would have urged with some hope of success, that the master under the order of court referring the matter to him, did not possess the power to take testimony, and that if he did possess such power, then it was irregularly exercised, because it should have been by deposition upon interrogatories."

To this it is answered,

First. The petitioner was bound to file all his exceptions to the master's report, within the period prescribed by law. Otherwise it is plain that there could be no end to this litigation. Story has filed no such exception as that which his counsel now say, they would have urged. The master's report was amended to supply a deficiency complained of by the present petitioner; and the amendment is in exact accordance with the exception of Story. This amendment therefore, can afford him no new ground of exception, and is not even objected to in the petition for a rehearing.

Second. The master was ordered to take an account between the complainant and the defendant; to credit the former with the rents and profits received by the latter, and the latter with the expenditures and disbursements, &c. made on account of certain property, &c. &c. How could the master do this without taking testimony to prove the rents and profits, expenditures and disbursements, &c.?

Third. The usual form of taking testimony in equity cases, is by deposition upon interrogatories: but testimony is often taken *vivâ voce:* In Turner *vs.* Burleigh, 17 Vesey's Rep. 355, the Lord Chancellor (Eldon) "held that the court would examine *vivâ voce* at the hearing, upon the suggestion of any question. In Aylett's case, upon an indictment for perjury, the question was made, whether this court had the right of examining *vivâ voce;* and it was settled that the examination may be in either way. The court must take care that the examination, in whatever way it takes place must be effectual, giving credit to the officer that he will effectually examine; and if, &c." The same point was ruled in 14 Vesey's Rep. 182. The 28th rule of practice for the courts of equity of the United States, adopted by the Supreme Court, empowers the master to summon witnesses before him, and to attach them in case of non-attendance, for contempt, adding that nothing therein contained shall prevent the examination "of witnesses *vivâ voce*, when produced in open court." It is true, the twenty-sixth rule says, that "testimony taken *under commission*, shall be taken on interrogatories and cross interrogatories, filed in the cause—*unless the parties shall dispense herewith*," but this refers to testimony taken "*under commission.*" Besides, from the master's report, it appears that the testimony taken in this case consisted partly of a document, or account sworn to by Story in the case of Desbordes *vs.* Story, partly of certificates or statements expressly admitted by Story himself to be received in evidence—and partly of the testimony of sworn witnesses

upon a due examination and cross examination of them, in which the present petitioner, so far from objecting to the mode of examination, actually joined. The exception, therefore, comes too late: Story dispensed with the tedious formalities of depositions upon interrogatories and cross interrogatories. He made no exception to the mode of examining witnesses before the master—none before the court. His complaint on this matter is now put forth for the first time—a complaint of the want of a form, with which he dispensed, but no complaint of any injustice done to him.

The petitioner next declares, that the counsel of Mr. Story "had expected an opportunity would have been afforded them to be heard in the cause before any decree would be pronounced by the court," and that "the cause should have been set for trial," and "placed upon some docket," and "some means should have been furnished them of ascertaining when the court would enter upon its investigation," adding, that "if the cause was heard, it was in the absence of one of the parties," and "without any opportunity being afforded him to participate."

To this it is answered;

This case was referred to the master, whose report upon it was filed and read in open court, in presence of Story's counsel, on the 18th December, 1837. The report is a very full one, and embraces all the points in the case before the court. The present petitioner filed his exceptions to the master's report on the 2d January, 1838, when the counsel for Livingston, moved to have them fixed for trial on the succeeding day. This was objected to by Story's counsel, who contended that it ought to be regularly called and fixed on the succeeding Saturday, which was accordingly done, and on that day in open court, the case was ordered to be tried on the 10th January, 1838. On the 10th January, the exceptions were brought before the court, John R. Grymes, Esquire, appearing for Mr. Story, when the court, after hearing argument upon it, ordered the master to amend it, so as to state that it contained all the evidence in the case, and took time to consider the other exceptions of Story. On the 16th January, 1838, the court overruled the said exceptions, and decreed that the defendant, Benjamin Story, pay to the complainant within six months from that day, the sum of $32,958 18, and *that the master's report be in all other respects confirmed.* The cause was thus regularly fixed for trial, and both parties appeared before the court.

The petitioner for a rehearing next declares, that "the decree" is too vague and indefinite "to answer the ends of judicial proceedings."

To this it is answered:

The decree directs Story to pay to the executrix of Edward Livingston $32,958 18, within six months from the 16th January, 1838.

This is sufficiently definite to answer all the ends of judicial proceedings. The petitioner next asks—"What has become of the question of costs?" and complains—"that the decree is wholly silent upon that subject."

Upon this matter,

The counsel of Louisa Livingston respectfully pray an order of this court, and submit the point without argument to the court. The petitioner next declares, that he was entitled to an opportunity to prove that Cora Barton is entitled to a portion of the real property in this case; and that if Story should convey the whole to Louisa Livingston, it would afford him no protection from said Cora.

To this it is answered:

The master's report shews, that from the proceedings had in the court of probates for New Orleans, Cora Barton is entitled to one-sixth, and Louise Livingston to five-sixths of the property. No exception was taken to this part of the report—and the same was confirmed. Story can incur no risk in obeying an order of this court. It is therefore prayed by this respondent that this court will order the property to be conveyed, and surrendered in conformity with the master's report in this case.

The suggestion of danger from Cora Barton's claims or rights, is wholly unfounded.

This respondent therefore prays, that the petition for a rehearing may be refused, and that this court will order Benjamin Story to pay the costs of this suit, and to surrender and reconvey the property forthwith to L. Livingston and Cora Barton, in the proportion of one-sixth to the latter, and five-sixths to the former.

(Signed) RANDALL HUNT,
for Respondent.

And on the same day the following entry of record was made, to wit:

EXT'X OF ED. LIVINGSTON
vs.
BENJAMIN STORY. } No. 128.

On this day the filing of the petition for a rehearing heretofore presented by the defendant was ordered to be noted, and the replication thereto filed this day by complainant's solicitor was also ordered to be noted; and it was further ordered, that the said petition be set for hearing for to-morrow at 10 o'clock, A. M.

And on the 3d February the following entry of record was made, to wit:

EXT'X OF ED. LIVINGSTON
vs.
BENJAMIN STORY. } No. 128.

This cause came on to-day before the court, on the petition for a rehearing, presented by the defendant, R. Hunt, Esq., appearing for complainant, and R. H. Chinn, Esq., for defendant, when after hearing the arguments of counsel, the court took time to consider.

And on the 6th February the following entries of record were made, to wit:

EXT'X OF ED. LIVINGSTON
vs.
BENJAMIN STORY.

The court having maturely considered the petition for a rehearing filed in this case by the defendant, now order, adjudge and decree, that said petition be refused.

EXT'X OF ED. LIVINGSTON
vs.
BENJAMIN STORY. } No. 128.

The petition for a rehearing having been overruled, it is ordered, adjudged and decreed, that the defendant, Benjamin Story, do further surrender and reconvey the property described in the bill of complaint as "all that parcel of ground situated on the batture of the suburb St. Mary, between Common and Gravier streets, measuring eighty-two feet fronting Common street—one hundred and twenty-six feet, or thereabouts, fronting Tchaptoulas street; one hundred and forty-six feet, or thereabouts, fronting New Levee street, and bounded on the other side by the lot of ground belonging to Messrs. Livermore, Morse, Miller and Pierce, containing 120 feet, or thereabouts; together with the buildings, improvements, and all other appurtenances to the same in any wise belonging or appertaining," to Louise Livingston, widow and executrix and devisee of Ed. Livingston, deceased, and to Cora Barton, daughter, and forced heir of said Ed. Livingston, in conformity to the decree of the Supreme Court of the United States, and to the decree heretofore made in pursuance thereof by this court.

And on the same day copies of said order were issued from the clerk's office, on one of which the following marshal's return was made and filed, to wit:

Served copy of the within order on the within named Benjamin Story in person. February 7th, 1838, at New-Orleans; and returned to court same day.

(Signed) J. H. HOLLAND, *Marshal.*

And afterwards, on the 9th February, the following petition for an appeal was filed, to wit:

To the Honorable the Judges of the Court of the United States in and for the Ninth Circuit and Eastern District of the State of Louisiana.

Your petitioner, Benjamin Story, respectfully represents;

That error has intervened to his prejudice in the decrees of this court, pronounced at the present term, in a suit therein pending in Chancery, wherein Louisa Livingston, &c., is complainant, and your petitioner is defendant. He therefore prays the court to award him an appeal to the Supreme Court of the United States, and he will execute a bond in such penalty upon such conditions as the court may prescribe, and with such security as the court will approve of.

(Signed) GRYMES & CHINN, *for Story.*

Judge's Order.

On motion of the defendant Story, an appeal is awarded him herein, upon his executing bond with James Collis, James Erwin and Cornelius Paulding, or any two of them, security, on or before the 17th February, 1838, in the penalty of seventy-five thousand dollars, conditioned to prosecute said appeal with effect, or satisfy and pay the money decreed to the complainant, and satisfy and pay all damages and costs that the complainant may sustain by reason of the granting the appeal, and in all respects to comply with the decree herein; and upon the execution of said bond, it will operate as a supersedeas in the case.

(Signed) P. K. LAWRENCE, *U. S. Judge.*

12 February, 1838.

And on said 9th day of February the following entry of record was made, to wit:

ED. LIVINGSTON'S EXT'X
vs.
BENJ. STORY. } No. 128.

The prayer for an appeal presented by the defendant, was this day argued before the court, J. R. Grymes, Esq., appearing for said defendant, and Randall Hunt, Esq. appearing for complainant, whereupon the court took time to consider. And afterwards, on the 12th February, the following entry of record was made, to wit:

ED. LIVINGSTON'S EXT'X
vs.
BENJ. STORY. } No. 128.

On motion of the defendant Story, an appeal is awarded him herein, upon his executing bond with James Collis, James Erwin and

Cornelius Paulding, or any two of them, security, on or before the 17th February, 1838, in the penalty of seventy-five thousand dollars, conditioned to prosecute said appeal with effect, or satisfy and pay the money decreed to the complainant, and satisfy and pay all damages and costs that the complainant may sustain, by reason of the granting the appeal, and in all respects to comply with the decree herein; and upon the execution of said bond, it will operate as a supersedeas in the case.

And afterwards, on the 16th February, the following two bonds of appeal were filed, to wit:

Know all men by these presents, that we, Benjamin Story, principal, and James Collis and Cornelius Paulding, securities, are held and firmly bound unto Louisa Livingston, widow, executrix and devisee of Edward Livingston, deceased, and to Cora Barton, daughter, and forced heir of said Edward Livingston, in the penal sum ,of seventy-five thousand dollars, to the payment of which, well and truly to be made, we bind ourselves, our heirs, &c., jointly and severally, firmly by these presents, sealed and dated this 16th day of February, 1838.

The condition of the above obligation is such, that whereas, at the May term of the Court of the United States for the Ninth Circuit and Eastern District of the State of Louisiana, a decree was pronounced, by which said Benjamin Story was decreed to pay to the complainant, the said Louise Livingston, within six months from the 16th day of January, 1838, the sum of thirty-two thousand nine hundred and fifty-eight dollars eighteen cents. And also, that the master's report in all other respects be confirmed, and that the said Story conform to the decree of the Supreme Court in the case; and that the defendant, Benjamin Story, should forthwith surrender, and reconvey, the property described in the bill of complaint as "all that parcel of ground situated on the batture of the suburb [of the suburb] St. Mary, between Common and Gravier streets, measuring eighty-two feet fronting Common street, one hundred and twenty-six feet, or thereabouts, fronting Tchapitoulas street, one hundred and forty-six feet, or thereabouts, fronting New Levee street, and bounded on the other side by the lot of ground belonging to Messrs. Livermore, Morse, and Miller, and Pierce, containing one hundred and twenty feet, or thereabouts, together with the buildings, improvements, and all other appurtenances, to the same in any wise belonging or appertaining," to the said Louisa Livingston, widow, and executrix, and devisee of Edward Livingston, deceased, and to Cora Barton, daughter, and forced heir of said Edward Livingston. From which decree the said Benjamin Story has prayed for and obtained an appeal to the next term of the Supreme Court of the United States, upon his entering into bond, with the said Collis and Paulding as his securities, in the penalty of seventy-five thousand dollars, conditioned as in the order of the court granting the appeal is prescribed.

Now if the said Benjamin Story shall prosecute the said appeal

with effect, or shall satisfy and pay the money decreed to the complainant, Louise Livingston, and shall satisfy and pay all damages and costs that the said Louise and Cora may sustain by reason of granting the said appeal, and in all respects comply with the said decree, then this obligation to be void, otherwise to remain in full force and virtue.

(SIGNED)	BENJAMIN STORY,	[SEAL.]
(SIGNED)	J. COLLIS,	[SEAL.]
(SIGNED)	C. PAULDING,	[SEAL.]

Signed and sealed in the presence of

(Signed) T. W. COLLINS, *D'y Cl'k of said Court.*

Know all men by these presents, that we, Benjamin Story, principal, and James Collis and Cornelius Paulding, securities, are held, and firmly bound unto Louise Livingston, widow, executrix and devisee of Edward Livingston, deceased, in the penal sum of seventy-five thousand dollars, to the payment of which, well and truly to be made, we bind ourselves, our heirs, &c., jointly and severally, sealed and dated this sixteenth day of February, 1838.

The condition of the above obligation is such, that whereas, at the May term of the Court of the United States for the ninth Circuit and Eastern District of the State of Louisiana, a decree was pronounced by which the said Benjamin Story was decreed to pay to the complainant, the said Louise Livingston, within six months from the 16th day of January, 1838, the sum of thirty-two thousand nine hundred and fifty-eight dollars, eighteen cents. And also that the master's report in all other respects be confirmed, and that the said Story conform to the decree of the Supreme Court in the case. And that the defendant, Benjamin Story, should forthwith surrender and reconvey the property described in the bill of complaint as "all that lot of ground situated on the batture of the suburb St. Mary, between Common and Gravier streets, measuring eighty-two feet fronting Common street, one hundred and twenty-six feet, or thereabouts fronting Tchapitoulas street, one hundred and forty-six feet or thereabouts fronting New Levee street, and bounded on the other side by the lot of ground belonging to Messrs. Livermore, Morse, and Miller and Pierce, containing one hundred and twenty feet or thereabouts, together with the buildings, improvements, and all other appurtenances to the same in any wise belonging or appertaining," to the said Louise Livingston, widow and executrix and devisee of Edward Livingston, deceased, and to Cora Barton, daughter and forced heir of said Ed. Livingston. From which decree the said Benjamin Story has prayed for, and obtained an appeal to the next term of the Supreme Court of the United States, upon his entering into bond with the said Collis and Paulding, as his securities, in the penalty of seventy-five thousand dollars, conditioned as in the order of the court granting the appeal as prescribed. Now if the said Benjamin Story shall prosecute the said appeal with effect, or shall satisfy and pay the money decreed to the complainant, and shall satisfy and pay all

damages and costs that the complainant in said suit may sustain by reason of granting the said appeal, and in all respects comply with said decree, then this obligation will be void, otherwise to remain in full force and virtue.

(Signed) BENJAMIN STORY, [SEAL.]
J. COLLIS, [SEAL.]
C. PAULDING, [SEAL.]

Signed and sealed in the presence of,
(Signed) T. W. COLLINS, *Deputy Clerk.*

Clerk's office, United States Circuit Court 9th Circuit, Eastern District of Louisiana.

I, Duncan N. Hennen, clerk of the said court, do hereby certify that the foregoing sixty two pages do contain a true copy of the proceedings, process, pleadings, documents, evidence, and all other matters on file and of record in a certain cause wherein Louisa Livingston, executrix of Edward Livingston, deceased, is complainant in equity, and Benjamin Story is defendant, so fully as appears by the record remaining in this office, from and including the date of the filing of the mandate of the Supreme Court in said cause.

Witness my hand, and the seal of the court, this day of March, A. D. 1838, and 62d year of the Independence of the U. S.

DUNCAN N. HENNEN, *Clerk.*

I, P. K. Lawrence, Judge of the United States District Court, Eastern District of Louisiana, do hereby certify, that Duncan N. Hennen, who subscribed the above certificate, was, on the day of March, 1838, clerk of the said court, and that all due faith and credit are, and ought to be given to his attestations as such, and that the above attestation is in due form of law.

Given under my hand and seal this 23d day of June, A. D. 1838.

P. K. LAWRENCE,
Judge U. S.

UNITED STATES OF AMERICA, *ss.*

The President of the United States,

To the Honourable the Judges of the Circuit Court of the United States, for the 9th Circuit, sitting in the Eastern District of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the decree on a bill which is in said court before you, in equity, between Louise Livingston, widow and executrix of Ed. Livingston, deceased, complainant, and Benjamin Story, defendant, a manifest error hath happened to the great damage of the said Benjamin Story, as by his complaint appears. We being willing that error, if any

hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if decree be therein given, that then, under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of August next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this second Monday of January, in the year of our Lord one thousand eight hundred and thirty-eight.

DUNCAN N. HENNEN,
Clerk of the Circuit Court of the United States for the 9th Circuit, sitting in the Eastern District of Louisiana.

UNITED STATES OF AMERICA,

To Louise Livingston, Executrix of Edward Livingston, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of August next, pursuant to a writ of appeal filed in the Clerk's office of the Circuit Court of the Ninth Circuit, sitting in and for the Eastern District of Louisiana; wherein Benjamin Story is appellant, and you are appellee, to shew cause, if any there be, why the final judgment or decree rendered against the said appellant, as in the said writ of appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this seventeenth day of February, Anno Domini one thousand eight hundred and thirty-eight, and of the Independence of the United States the sixty-second.

P. K. LAWRENCE,
United States Judge.

MARSHAL'S RETURN.

Served in person, 3d April, 1838, on Randall Hunt, a copy of the within, he being attorney of the within named Executrix of Livingston. Returned Monday, 9th instant.

H. BACON, *U. S. Dep. Marshal.*